

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
July 8, 2009 Session

**BONNIE CADY v. TENNESSEE BOARD OF VETERINARY MEDICAL  
EXAMINERS**

**Appeal from the Chancery Court for Davidson County**  
**No. 05-781-II, 06-1689-II      Carol L. McCoy, Chancellor**

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**No. M2008-02551-COA-R3-CV - Filed August 27, 2009**

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This is an appeal from two separate but related contested case hearings before the Tennessee Board of Veterinary Medical Examiners. The first case pertains to a Notice of Charges filed by the Tennessee Department of Health against Bonnie Cady, a breeder and trainer of horses, alleging that she had engaged in the unlicensed practice of veterinary medicine as defined by Tenn. Comp. R. & Regs. 1730-1-.02. Following a hearing before the Tennessee Board of Veterinary Medical Examiners, the Board found Ms. Cady had engaged in the unlicensed practice of veterinary medicine and assessed \$17,000 in civil penalties against her. The second case was initiated by Ms. Cady who sought a Declaratory Order that the Rule she was alleged to have violated, Tenn. Comp. R. & Regs. 1730-1-.02, was void because the definition of the “scope of the practice of veterinary medicine” in the Rule adopted by the Board was impermissibly broader than and inconsistent with the statutory definition set forth in sections 63-12-103(9), (17) of the Tennessee Veterinary Practice Act. Following a hearing on the declaratory order case, the Board found that the Rule was promulgated in accordance with the Board’s statutory authority and was “neither broader than nor inconsistent with” the definition of the practice of veterinary medicine in the statute. Ms. Cady appealed both rulings. The Chancery Court reversed the Board’s ruling in both cases based on its finding that Tenn. Comp. R. & Regs. 1730-1-.02 was invalid because it was overbroad and inconsistent with the statutory definition. We affirm the Chancellor’s finding that Tenn. Comp. R. & Regs. 1730-1-.02 is invalid. We also affirm the Chancellor’s decision to reverse the Board’s imposition of civil penalties against Ms. Cady because the Board found that she had violated Tenn. Comp. R. & Regs. 1730-1-.02, not the Tennessee Veterinary Practice Act, and the Rule is invalid.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed**

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which RICHARD H. DINKINS, J., joined. PATRICIA J. COTTRELL, P.J., M.S., not participating.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; and Sue A. Sheldon, Senior Counsel, for the appellant, Tennessee Board of Veterinary Medical Examiners.

Frank J. Scanlon, Nashville, Tennessee, for the appellee, Bonnie Cady.

Irwin Venick, Nashville, Tennessee, for the Amicus Curiae, Tennessee Veterinary Medical Association.

## OPINION

The issues on appeal pertain to the business activities of the Appellee, Bonnie Cady, for the period from 1987 to 2004. Since 1986, Ms. Cady has owned and operated a horse training, boarding, and breeding business in Shelbyville, Tennessee under the business name “The Horse Hub.” The Horse Hub farm consists of 318 acres on which is located four barns with 56 stalls. The services provided by Ms. Cady at the Horse Hub include the breeding of mares, taking care of mares from foaling to re-breeding, collecting semen from stud horses for shipment and use off-site, training horses, and boarding horses.<sup>1</sup> Ms. Cady has provided these services for horses she owned and for horses owned by others.<sup>2</sup>

Bonnie Cady received formal training to breed horses at Colorado State University<sup>3</sup> and she is a member of the Tennessee Walking Horse Breeders Association. Ms. Cady is not, and has never been, licensed to practice veterinary medicine, and she has never represented herself to be a veterinarian.

On July 15, 2004, the Office of the General Counsel of the Department of Health (“Department”) served Ms. Cady with a Notice of Charges alleging that she had engaged in conduct constituting the unlicensed practice of veterinary medicine as defined by Tenn. Comp. R. & Regs. 1730-1-.02, a Rule adopted by the Board of Veterinary Medical Examiners, for which the Department would seek civil penalties pursuant to Tenn. Code Ann. § 63-12-119. Specifically, the Department alleged that the following services provided by Ms. Cady were in violation of Rule 1730-1-.02: artificially inseminating mares,<sup>4</sup> flushing mares, performing ultrasound examinations on mares to ascertain if they were pregnant, infusing horses with antibiotics, injecting Prostin and other drugs to get horses to come into season, and injecting HCG to get mares to ovulate.

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<sup>1</sup> Ms. Cady started raising horses as a hobby in the 1970s. In 1987, one of Ms. Cady’s horses won the national title at the Tennessee Walking Horse Celebration. In 2000, a horse Ms. Cady raised won the national title.

<sup>2</sup> In 2003, for example, Ms. Cady bred 85 mares; fifty of which she owned, thirty-five were owned by others.

<sup>3</sup> The training of non-veterinarians in artificial insemination and breeding practices is not uncommon. At trial, Dr. Gary Heusner, from the University of Georgia School for Veterinary Medicine, testified that the University of Georgia and other universities provide classes and training for non-veterinarians on breeding and artificial insemination.

<sup>4</sup> Pursuant to a 2006 amendment Tenn. Code Ann. § 63-12-133(c), “artificial insemination” is now statutorily designated as an “accepted livestock management practice,” which practice does not require a veterinary license. 2006 Pub. Acts, Chap. 532, § 1, codified at Tenn. Code Ann. § 63-12-133(c). The 2006 amendment reads: “For the purposes of this chapter, the practice of veterinary medicine shall not include the artificial insemination of livestock, . . . The practice of artificial insemination shall be considered an accepted livestock management practice.” Tenn. Code Ann. § 63-12-133(c).

On December 9, 2004, the Board of Veterinary Medical Examiners (“Board”) convened a contested case hearing on the charges against Ms. Cady. Following the hearing, the Board issued an order on March 1, 2005, finding as fact that Ms. Cady had personally provided the following services for customers from 1987 to 2004: artificially inseminated mares; flushed mares; performed ultrasound examinations on mares to check for pregnancy; infused horses with antibiotics; injected Prostin and other drugs to get horses to come into season; and injected HCG to get mares to ovulate. Based upon these facts the Board concluded, as a matter of law, that Ms. Cady had engaged in the unlicensed practice of veterinary medicine for which an assessment of \$17,000 in civil penalties was authorized.

During the pendency of the disciplinary action, Ms. Cady filed a Petition for a Declaratory Order with the Board in which she challenged the validity of Tenn. Comp. R. & Regs. 1730-1-.02. In her petition, Ms. Cady alleged that Rule 1730-1-.02 was void because the Board exceeded its statutory authority by adopting a definition of the practice of veterinary medicine that was inconsistent with and impermissibly expanded the definition in sections 63-12-103(9) and (17) of the Tennessee Veterinary Practice Act. The Board granted Ms. Cady’s request for a hearing and published notice of the hearing. The administrative law judge subsequently allowed two additional horse breeders<sup>5</sup> and the Tennessee Veterinary Medical Association to intervene.

Following the contested case hearing on Ms. Cady’s petition for a Declaratory Order, the Board issued its Declaratory Order upholding the validity of Rule 1730-1-.02. The Board’s findings of fact and conclusions of law stated in the Declaratory Order are the following:

#### I. FINDINGS OF FACT

1. Since 1986, Petitioner Bonnie Cady has owned and operated a horse training and breeding business located at 208 Montgomery Road in Shelbyville, Tennessee under the name “The Horse Hub.” The Horse Hub provides a wide range of equine services including boarding, training and breeding. Ms. Cady is not now, nor has she ever been, licensed to practice veterinary medicine in the State of Tennessee. She has never held herself out to be a veterinarian.
2. With respect to her horse breeding business, Ms. Cady has artificially inseminated mares and tested for pregnancy using ultrasound technology. Ms. Cady testified that these services are necessary to maintain her horse breeding business.
3. Aside from Ms. Cady’s specific actions and experiences, testimony established that artificial insemination is a well-established, long-standing

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<sup>5</sup> The intervenors were Jeremy Carlton, a Shelbyville, Tennessee horse breeder, and Steve Beech, a Lewisburg, Tennessee horse breeder. Neither Mr. Carlton nor Mr. Beech is licensed to practice veterinary medicine.

livestock management practice. Mr. John Woolfolk, Associate Director of Commodity Activities for one of the intervening parties, the Tennessee Farm Bureau Federation, confirmed this point. In the case of cattle, artificial insemination has been a prevalent practice since the 1960's, and a number of organizations have offered and continue to offer courses for non-veterinarians with respect to artificial insemination of cattle.

4. Dr. Gary Heusner, a Professor of Animal Sciences at the University of Georgia, presented testimony regarding the performance of artificial insemination by non-veterinarians on horses. A number of programs at various universities throughout the country offer courses for non-veterinarians on equine artificial insemination. Dr. Heusner conducts such courses himself, and has done so for the past ten years at the University of Georgia. Dr. Heusner's course has been attended by non-veterinarians by a number of states, including Tennessee.
5. Tennessee state law, Tenn. Code Ann. § 63-12-125, provides that the Uniform Administrative Procedures Act, Tenn. Code Ann. § 4-5-101 et seq., governs the promulgation of rules by the Board.
6. Tenn. Code Ann. § 63-12-103(9) defines the "practice of veterinary medicine."
7. Tenn. Code Ann. § 63-12-103(17) defines "veterinary medicine."
8. Tenn. Code Ann. § 63-12-106(1) authorizes the Board to promulgate rules to regulate the practice of veterinary medicine in Tennessee.
9. The Board's rule, Tenn. Comp. R. & Regs. 1730-1-.02, defines the scope of practice of veterinary medicine.
10. The language of Tenn. Comp. R. & Regs. 1730-1-.02(1) incorporates Tenn. Code Ann. § 63-12-103(9)(A), (C) and (H) almost verbatim.
11. The language of Tenn. Comp. R. & Regs. 1730-1-.02(1) incorporates Tenn. Code Ann. § 63-12-103(17) in its entirety.

## II. CONCLUSIONS OF LAW

The Findings of Fact in Paragraphs 1 through 11 of Section I of this Order are sufficient to establish the following conclusions of law:

1. Tenn. Comp. R. & Regs. 1730-1-.02 was promulgated in accordance with the Board's authority to promulgate rules to regulate the practice of veterinary medicine in Tennessee.
2. Tenn. Comp. R. & Regs. 1730-1-.02 is neither broader than nor inconsistent with the definition of the "practice of veterinary medicine" in Tenn. Code Ann. § 63-12-103(9) or the definition of "veterinary medicine" in Tenn. Code Ann. § 63-12-103(17), and is therefore a valid rule of the Board.

Being dissatisfied with the Board's ruling in each of the contested cases, Ms. Cady timely filed separate petitions with the Chancery Court of Davidson County requesting that it review the decisions of the Board under Tenn. Code Ann. § 4-5-322. The two petitions for judicial review were consolidated for hearing in the Chancery Court. On March 24, 2008, the Chancellor issued a Memorandum and Order reversing both decisions of the Board. The Chancellor found that Tenn. Comp. R. & Regs. 1730-1-.02 was "overbroad and inconsistent with the statutory definition of the 'practice of veterinary medicine' set forth at Tenn. Code Ann. § 63-12-103(9) and (17)." Because the Chancellor found the Rule invalid, the Chancellor also reversed the disciplinary ruling of the Board that Ms. Cady had engaged in the unlicensed practice of veterinary medicine. This appeal by the Board followed.

On appeal, the Board contends that the Chancellor erred in reversing the Board's application of Tenn. Comp. R. & Regs. 1730-1-.02 against Ms. Cady and in reversing the Board's ruling that its rule is valid. We will first address the issue concerning the validity of Tenn. Comp. R. & Regs. 1730-1-.02.

### **Analysis**

An administrative agency's authority must be based on an express grant of statutory authority or must arise by necessary implication therefrom. *Wayne County v. Tennessee Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 282 (Tenn. App. 1988); *Tennessee Pub. Serv. Comm'n v. Southern Ry.*, 554 S.W.2d 612, 613 (Tenn. 1977). If an agency's action exceeds its statutory authority, this Court may vacate the agency's decision. *Tennessee Cable Television Ass'n v. Tennessee Pub. Serv. Comm'n*, 844 S.W.2d 151, 163 (Tenn. App. 1992).

If an administrative agency or board is statutorily authorized to make rules and regulations, the rules and regulations promulgated by the agency or board may not be inconsistent with the enabling statute. *Holiday Inns, Inc. v. Olsen*, 692 S.W.2d 850, 853 (Tenn. 1985) (citing *Tasco Developing and Building Corp. v. Long*, 368 S.W.2d 65, 67 (1963); *Beazley v. Armour*, 420 F. Supp. 503, 507 (M.D. Tenn. 1976); T.C.A. § 67-1-102). If the rules adopted by the agency or board are inconsistent with the statute then they are invalid. *Id.* Further, if the statute that grants an agency or board the statutory authority to adopt rules and regulations defines the scope of the licensed profession and the areas in which a licensed professional may lawfully practice, the rules and regulations adopted may not be overly broad and may not expand the practice of that profession

beyond what the legislature intended. See *Tenn. Med. Assoc. v. Tenn. Bd. of Dentistry*, No. M1999-02279-COA-R3-CV, 2001 WL 839032, at \*8 (Tenn. Ct. App. July 25, 2001). If it does, then the rule is void. *Id.*

The interpretation of a statute is a question of law. *Tenn. Med. Assoc. v. Tenn. Bd. of Dentistry*, No. M1999-02279-COA-R3-CV, 2001 WL 839032, at \*6 (Tenn. Ct. App. July 25, 2001) (citing *Sanifill of Tennessee, Inc. v. Tennessee Solid Waste Disposal Control Bd.*, 907 S.W.2d 807, 810 (Tenn. 1995); *Beare Co. v. Tenn. Dept. of Revenue*, 858 S.W.2d 906, 907 (Tenn. 1993)). Questions of law are reviewed by this Court under the de novo standard. *Id.* (citing *Ridings v. Ralph M. Parsons, Co.*, 914 S.W.2d 79, 80 (Tenn. 1996)).

#### THE TENNESSEE VETERINARY PRACTICE ACT

The Tennessee Board of Veterinary Medical Examiners (the “Board”) was created with the enactment of the Tennessee Veterinary Practice Act, Tenn. Code Ann. § 63-12-101 *et seq.*, and was granted the authority to “[a]dopt reasonable rules governing the practice of veterinary medicine as are necessary to enable it to carry out and make effective the purpose and intent of this chapter.” Tenn. Code Ann. § 63-12-106(1). The stated purpose of the Tennessee Veterinary Practice Act (the “Act”) is “[t]o protect the public from being misled by incompetent, unscrupulous and unauthorized practitioners, and from unprofessional or illegal practices by persons licensed to practice veterinary medicine.” Tenn. Code Ann. § 63-12-102.

Two statutory definitions within the Act are pertinent to our inquiry. One is the definition of “the practice of veterinary medicine,” the other is the definition of “veterinary medicine.” Tenn. Code Ann. § 63-12-103(9), (17). By statutory definition, “the practice of veterinary medicine” means to:

- (A) Diagnose, prescribe or administer any drug, medicine, biologic, appliance, application or treatment of whatever nature for the cure, prevention or relief of any wound, fracture, bodily injury or disease of animals;
- (B) Perform any surgical operation, including cosmetic surgery, upon any animal;
- (C) Perform any manual procedure for the diagnosis or treatment for sterility or infertility of animals;
- (D) Represent oneself as engaged in the practice of veterinary medicine in any of its branches;
- (E) Offer, undertake or hold oneself out to be able to diagnose, treat, operate or prescribe for any animal disease, pain, injury, deformity or physical condition;

(F) Use any words, letters or titles in such connection or under such circumstances as to induce the belief that the person using them is engaged in the practice of veterinary medicine; such use shall be prima facie evidence of the intention to represent oneself as engaged in the practice of veterinary medicine;

(G) Collect blood or other samples for the purpose of diagnosing disease or other conditions. This shall not apply to unlicensed personnel employed by the United States department of agriculture or the Tennessee department of agriculture who are engaged in the brucellosis eradication program or external parasite control program, nor shall it apply to unlicensed personnel who perform laboratory examinations. This section does not prohibit extension personnel or vocational agriculture teachers from doing educational work that is considered normal to their profession; and

(H) Remove an embryo from a food animal or companion animal for the purpose of transplanting such embryo into another female animal or for the purpose of cryopreserving such embryo. It shall not be considered the practice of veterinary medicine for a person or the person's employees to remove an embryo from such person's own food or companion animal for the purpose of transplanting or cryopreserving such embryo;

Tenn. Code Ann. § 63-12-103(9)(A)-(H) (2006).

“Veterinary medicine” is statutorily defined to include “veterinary surgery, obstetrics, dentistry and all other branches or specialties of veterinary medicine.” Tenn. Code Ann. § 63-12-103(17).

TENN. COMP. R. & REGS. 1730-1-.02

Based upon the Board's interpretation of the Act in effect prior to the 2006 amendment to Tenn. Code Ann. § 63-12-133(c),<sup>6</sup> which excluded artificial insemination from the practice of veterinary medicine, the Board adopted Tenn. Comp. R. & Regs. 1730-1-.02 which states:

(1) The scope of practice of veterinary medicine means to diagnose, treat, correct, change, relieve, or prevent animal disease, deformity, defect, injury or other physical or mental conditions; including the prescription or administration of any drug, medicine, biologic, apparatus, application, anesthetic, or other therapeutic or diagnostic substance or technique, and the use of any manual or mechanical procedure for artificial insemination, for testing for pregnancy, or for correcting

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<sup>6</sup> This statutory provision was amended effective April 19, 2006 to *exclude* artificial insemination from the practice of veterinary medicine. 2006 Pub. Acts, Chap. 532, § 1, codified at Tenn. Code Ann. § 63-12-133(c) (2008 Supp.). The amendment designated artificial insemination as an “accepted livestock management practice,” the practice of which does not require a veterinary license.

sterility or infertility or to render advice or recommendation with regard to any of the above.

(2) The scope of practice of veterinary medicine includes, but is not to be limited to, surgery, obstetrics, dentistry, chiropractic, radiology, acupuncture, animal psychology, ultrasonography, fluoroscopy, embryo transfers, homeopathy, herbology, naturopathy and all other branches or specialties of veterinary medicine.

Tenn. Comp. R. & Regs. 1730-1-.02.

#### WHETHER RULE 1730-1-.02 EXCEEDS THE STATUTORY PROVISIONS

In determining whether Tenn. Comp. R. & Regs. 1730-1-.02 exceeds the statutory provisions, the courts do not give deference to the Board's interpretation of the Act or the Board's order ruling on the statutory construction, because matters of statutory interpretation are questions of law. *See Tenn. Med. Assoc. v. Bd. of Registration in Podiatry*, 907 S.W.2d at 824 (holding the Podiatry Board was not entitled to deference in determining whether the statutory meaning of the term "foot" included the "ankle"). Instead, when construing statutes, the courts examine the statutory provisions to ascertain the legislature's intent as it is the role of this court to ascertain and give effect to legislative intent. *Tenn. Med. Assoc. v. Tenn. Bd. of Dentistry*, No. M1999-02279-COA-R3-CV, 2001 WL 839032, at \*8 (Tenn. Ct. App. July 25, 2001) (citing *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 924 (Tenn. 1998)). In determining legislative intent, the courts must look to the "natural and ordinary meaning of the language used in the statute and should not use a forced or strained construction of the statute's language." *Id.* (citing *Myint*, 970 S.W.2d at 924).

In reversing the ruling of the Board in the Declaratory Order action, the Chancellor held that Tenn. Comp. R. & Regs. 1730-1-.02 was invalid because it was "overbroad and inconsistent with the statutory definition of the 'practice of veterinary medicine' set forth at Tenn. Code Ann. § 63-12-103(9) and (17)." We agree with the Chancellor.

The Board was authorized to promulgate rules to aid it in carrying out the purpose and intent of the Act. It was not, however, authorized to expand the definition or scope of the practice of veterinary medicine beyond that defined by the Legislature. *See Tenn. Med. Assoc. v. Bd. of Podiatry*, 907 S.W.2d at 825; *see also Tenn. Med. Assoc. v. Tenn. Bd. of Dentistry*, 2001 WL 839032, at \*8. We have concluded that it did just that, contrary to the Board's erroneous finding of fact that the language of Tenn. Comp. R. & Regs. 1730-1-.02(1) incorporates Tenn. Code Ann. § 63-12-103(9)(A), (C) and (H) "almost verbatim," and its erroneous conclusion of law that the Rule "is neither broader than nor inconsistent with the definition of the 'practice of veterinary medicine' in Tenn. Code Ann. § 63-12-103(9) or the definition of 'veterinary medicine' in Tenn. Code Ann. § 63-12-103(17), . . ."

The most obvious and substantial inconsistency is the language within the Rule which provides that the scope of the practice of veterinary medicine includes any action to "treat, correct,

change, relieve” an animal’s “injury or other physical or mental conditions.” This is substantially broader and more encompassing than the Legislature’s definition of the practice of veterinary medicine. *See* Tenn. Code Ann. § 63-12-103(9)(A). As contrasted with the Board’s Rule, the Legislature more narrowly defined the practice of veterinary medicine in section 63-12-103(9)(A) as to “[d]iagnose, prescribe, or administer any drug, medicine, biologic, appliance, application or treatment of whatever nature *for the cure, prevention or relief of any wound, fracture, bodily injury or disease of animals.*” Tenn. Code Ann. § 63-12-103(9)(A) (emphasis added).

The statute does not state that “the use of any manual or mechanical procedure for artificial insemination” and “for testing for pregnancy” is within the scope of veterinary medicine. The Rule, however, defines the practice of veterinary medicine to include these activities. Neither of these activities are included within the statutory definition of the practice of veterinary medicine; thus, the Rule expanded the statutory definition. We also note that neither of these activities fall within the umbrella set forth in Tenn. Code Ann. § 63-12-103(9)(A) regarding activities “for the cure, prevention or relief of any *wound, fracture, bodily injury or disease.*” (Emphasis added).

We find it significant that the Legislature included within the statutory definition of the practice of veterinary medicine “any manual procedure for the diagnosis or treatment for *sterility or infertility* of animals,” Tenn. Code Ann. § 63-12-103(9)(C), and the Legislature included within the statutory definition the act of *removing* “an embryo from a food animal or companion animal for the purpose of transplanting such embryo into another female animal or for the purpose of cryopreserving such embryo,” *see* Tenn. Code Ann. § 63-12-103(9)(H); yet, the Legislature did not include “artificial insemination” or “testing for pregnancy” within the statutory definition of the practice of veterinary medicine.

The Board, however, contends these activities are properly included due to Tenn. Code Ann. § 63-12-103(17)’s inclusion of “obstetrics” as a branch or specialty of veterinary medicine. We, however, find this contention unpersuasive. The Legislature chose to identify specific activities to be within the practice of veterinary medicine. The fact that the Legislature acknowledged the various branches of veterinary medicine, including obstetrics, does not authorize the Board to expand the definition of the practice by including any activity that relates to obstetrics.<sup>7</sup> To the contrary, the Legislature identified specific activities in regards to animal reproduction that require licensure, specifically matters pertaining to *sterility, infertility, and transplanting embryos*, as each of these activities were identified as constituting the practice of veterinary medicine. Pursuant to the canon of statutory construction, *expressio unius est exclusio alterius*, we must assume the Legislature by including the specific terms, sterility, infertility, and transplanting embryos, but not artificial insemination, which is one of the most frequently employed activities in the field of equine

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<sup>7</sup> The Chancery Court adopted the definition of obstetrics contained within Websters New World Dictionary of the American Language, copyrighted in 1964, as “the branch of medicine concerned with the care and treatment of women in pregnancy, childbirth, and the period immediately following.” Additionally, the Attorneys’ Dictionary of Medicine defines obstetrics as “the branch of medicine, technically of surgery, which deals with the care of women during their pregnancy, labor, and the post-labor period.” 4 *Attorneys’ Dictionary of Medicine* 179 (2005). We find both of these definitions support our position.

obstetrics, intended to omit artificial insemination from the definition of the practice of veterinary medicine. See *Overstreet v. TRW Commercial Steering Div.*, 256 S.W.3d 626, 633 (Tenn. 2008) (citing *TRW, Inc. v. Andrews*, 534 U.S. 19, 28-29 (2001); *State v. Strode*, 232 S.W.3d 1, 10 (Tenn. 2007)) (“A familiar canon of statutory interpretation expresses: *expressio unius est exclusio alterius* (‘to express one thing is to exclude others’”). Based upon the foregoing, we have determined that the Board’s inclusion of artificial insemination in its Rule constitutes an impermissible expansion of the Legislature’s definition of the practice of veterinary medicine and the Board’s authority.

Our determination is fully consistent with prior decisions of this Court, particularly *Tenn. Med. Assoc. v. The Bd. of Registration in Podiatry*, 907 S.W.2d 820, 825 (Tenn. Ct. App. 1995), and *Tenn. Med. Assoc. v. Tennessee Bd. of Dentistry*, 2001 WL 839032, at \*8. We will discuss each in detail below.

In *The Board of Registration in Podiatry* case, we held that the Board of Podiatry’s declaratory order impermissibly expanded the definition of the practice of podiatry to include the treatment of the ankle. *Tenn. Med. Assoc. v. Bd. of Podiatry*, 907 S.W.2d at 825. The Podiatry Board was charged, *inter alia*, with the duty of prohibiting podiatrists from practicing beyond their statutory scope of practice, Tenn. Code Ann. § 63-3-106, and by statute, the practice of podiatry was limited to treatment of ailments of “the human foot.” *Id.* (citing Tenn. Code Ann. § 63-3-101).

The issue arose when a podiatrist filed a petition with the Board of Registration in Podiatry seeking a declaratory order that the “treatment of an ankle sprain was within the definition of a podiatrist as defined by Tennessee Code Annotated section 63-3-101. *Id.* at 820-21. Following the declaratory order hearing, the Podiatry Board voted “to expand the definition of podiatrist to include the treatment of the soft tissue involved in an ankle sprain, both above and below the ankle joint. The Board held that in order to effectively treat an ankle sprain, podiatrists must be allowed to treat the structures adjacent to the foot.” *Id.* at 821.

Thereafter, the Tennessee Medical Association and an orthopaedic physician filed a Petition for Judicial Review pursuant to Tennessee Code Annotated section 4-5-322 seeking a reversal of the Podiatry Board’s decision. *Id.* They sought a declaration that treatment of an ankle sprain exceeds Tennessee Code Annotated section 63-3-101, to the extent it requires treatment of structures above the foot. *Id.* Following submission of the briefs by the parties and oral argument, the Chancellor reversed the decision of the Board. *Id.* The Board appealed the Chancellor’s decision. *Id.*

The issue on appeal was whether an ankle sprain is an ailment of the “foot.” *Id.* This court determined that there was no evidence in the record to establish that the term “foot” means “foot and ankle” and, therefore, there was no substantial and material evidence to establish that treating an

ankle sprain is treating an ailment of the foot.<sup>8</sup> *Id.* at 821. As this court concluded, the record was lacking in substantial and material evidence that the common meaning of the term “foot” means “foot and ankle,” stating

Tennessee Code Annotated section 63-3-101 defines podiatrist as “one who examines, diagnoses or treats medically, mechanically, or surgically, the ailments of the human foot. . . .” The law does not demarcate the anatomical barrier. The Board finds that all the soft tissue involved in an ankle sprain are within that definition. The Board, therefore, concluded that the ankle is an adjacent structure, not a part of the foot. The ankle cannot be both a part of the foot and an adjacent structure.

*Id.* at 825. Accordingly, we held that the Podiatry Board’s decision was not supported by substantial and material evidence, and that the Chancellor correctly reversed the decision of the Board as the decision exceeded the statutory authority of the Podiatry Board. *Id.*

Our opinion in *Podiatry* further noted that the petitioner and the Board of Podiatry were entitled to attempt to expand the scope of podiatry; however, the proper vehicle for that expansion is by legislative revision of the podiatry statute, not through a contested case hearing that disregards the clear and plain meaning of the statute. The Board’s decision extended the practice of podiatry to “areas adjacent to the foot” rather than determining whether an ankle sprain was an ailment of the foot.

*Id.* Because the Podiatry Board exceeded its statutory authority, the judgment of the Chancellor in reversing the decision of the Board was affirmed. *Id.*

In the other case, *Tenn. Med. Assoc. v. Tenn. Bd. of Dentistry*, this Court held that the Board of Dentistry’s declaratory order, which authorized dentists to perform a variety of cosmetic procedures about the face, constituted an impermissible expansion of the statutory definition of the practice of dentistry stated in Tenn. Code Ann. § 63-5-108(a)(1). *Tenn. Med. Assoc. v. Tenn. Bd. of Dentistry*, 2001 WL 839032, at \*8. In that matter, a dentist, Dr. Hunter, who was a specialist in “oral and maxillofacial surgery,” petitioned the Board of Dentistry “to declare that he had the right under his dental license to perform various cosmetic procedures involving the face and neck, such as face

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<sup>8</sup>The court determined that the evidence before the Board established that the terms “foot and ankle” describe different anatomical areas and the evidence established that the common usage of the term “foot” means the portion of the leg below the ankle. *Tenn. Med. Assoc. v. Bd. of Podiatry*, 907 S.W.2d at 822. “Webster’s New International Dictionary of the English Language, Second Edition defines “foot” as “the terminal part of the leg of a man or an animal; that part of an animal upon which it rests when standing, or upon which it moves. In man, the foot is the pes, or part of the leg below the ankle joint or tibiotarsal articulation; . . .” *Id.* (quoting Webster’s New International Dictionary of the English Language, Second Edition).

lifts and nose jobs,”<sup>9</sup> and that the performance of these procedures constituted the practice of dentistry under the Tennessee Dental Practice Act. *Id.* at \*1.<sup>10</sup>

In its initial ruling in May 1996, which is the ruling relevant to the issue in this case, the Board of Dentistry ruled that the word “esthetic,” appearing in the definition of “oral and maxillofacial surgery” in the Rules of the Tennessee State Board of Dentistry, was broad enough to encompass such cosmetic procedures, granted Dr. Hunter’s petition, and issued a declaratory order that he could perform such cosmetic procedures. *Id.* at \*2.

The Tennessee Medical Association and two plastic surgeons<sup>11</sup> intervened and petitioned the Chancery Court to review the Board of Dentistry’s decision, contending the Board’s decision “was in violation of the statutes governing the practice of dentistry, was in excess of its statutory authority, was arbitrary and capricious, was an abuse of discretion, and was unsupported by substantial and material evidence.” *Id.* Thereafter, the Chancery Court reversed the Board of Dentistry’s decision, finding that “the Board had improperly expanded the practice of dentistry beyond what the legislature intended and that its decision was not supported by substantial and material evidence.” *Id.* at \*5. In its order reversing the Board’s decision, the Chancery Court concluded in relevant part that the Board’s order “impermissibly expands” the scope of dental practice to areas outside the teeth, jaws, and associated structures and that the Board exceeded its authority in promulgating Rule 0460-1-.01(14), by enlarging the specialty of “oral maxillofacial surgery” to “oral *and* maxillofacial surgery.” *Id.* Further, the Chancery Court held that the Board’s decision to allow “cosmetic procedures to the ‘full facial complex,’ without defining what comprises this area in its finding of

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<sup>9</sup> The dentist also asked the Board to issue an order stating that he could perform procedures such as:

1) blepharoplasty, or “eye lift”; 2) rhytidectomy, or “face lift”; 3) rhinoplasty, or “nose job”; 4) otoplasty, a procedure in which the ears are “tacked” back so they do not protrude excessively from the head; 5) liposuction, a surgical fat-removal procedure; 6) chemical peel, a procedure in which facial skin is burned with caustic chemicals and allowed to heal; 7) dermabrasion, a procedure in which facial skin is scrubbed with abrasive materials; and 8) the “esthetic reconstruction” of benign and malignant lesions, such as moles, anywhere on the head and neck. For ease of reference, these procedures will be referred to as “cosmetic procedures.”

*Tenn. Med. Assoc. v. Tenn. Bd. of Dentistry*, 2001 WL 839032, at \*1.

<sup>10</sup> The statutory definition of the practice of dentistry was the diagnosis and treatment of “any disease, pain, deformity, deficiency, injury or physical condition of the *human teeth or jaws, or associated structures.*” *Id.* at \*2 n.2 (citing Tenn.Code Ann. § 63-5-108(a)(1) (Supp.2000)) (emphasis added). The definition contained within the Rules of the Board of Dentistry defined the specialty of “oral and maxillofacial surgery” as: “[t]hat specialty branch of dentistry which includes the diagnosis, surgical and abjunctive treatment of diseases, injuries and defects involving both the functional and esthetic aspects of the hard and soft tissues of the oral and maxillofacial regions.” *Id.* (citing Rules of the Tennessee State Board of Dentistry, General Rules, Chap. 0460-1-.01(14) (April 2000)).

<sup>11</sup> These parties were Dwayne Fulks, M.D., a plastic and reconstructive surgeon practicing in Columbia, Tennessee, and Stephen Pratt, M.D., a plastic and reconstructive surgeon practicing in Nashville, Tennessee. *Tenn. Med. Assoc. v. Tenn. Bd. of Dentistry*, 2001 WL 839032, at \*2.

fact or conclusions of law, impermissibly expands the scope of dental practice to areas outside the teeth, jaws and associated structures.” *Id.* From this order, Dr. Hunter appealed. *Id.*

On appeal, we affirmed the Chancellor, finding that the Board of Dentistry’s decision was contrary to the Dental Practice Act, reasoning:

the statute defines the practice of dentistry as the diagnosis and treatment of “any disease, pain, deformity, deficiency, injury or physical condition of the human teeth or jaws or associated structures.” *See* Tenn.Code Ann. § 63-5-108(a)(1). Dr. Hunter’s specialty, oral and maxillofacial surgery, is a specialty that must fit within this definition of dentistry.

In the order that is the subject of this appeal, the Board of Dentistry notes that Dr. Hunter sought to perform blepharoplasty (eye lifts), rhytidectomy (face lifts), rhinoplasty (nose jobs), otoplasty (tacking back ears), liposuction (removal of fat), chemical skin peels, dermabrasion (abrasion of skin), and the “esthetic reconstruction” of both benign and malignant lesions anywhere on the head or neck. The Board declared that, within his license as a dentist, Dr. Hunter “can perform the aforementioned surgical procedures. . . .” There were no restrictions placed on Dr. Hunter’s ability to perform such procedures.

As it is written, the Board’s declaratory order appears to be a *blanket authorization* for Dr. Hunter, a dentist, to advertise and perform in his office eye lifts, nose jobs, face lifts and other such procedures normally performed by a licensed physician specializing in plastic surgery. The *amici* brief rightly notes that oral and maxillofacial surgeons such as Dr. Hunter frequently must participate in treating patients who have suffered facial trauma or other problems that necessitate extensive reconstructive surgery, and that there is not always a “bright line” distinction in the responsibilities of a physician who is a plastic surgeon and a dentist who is an oral and maxillofacial surgeon such as Dr. Hunter. We recognize that this is necessary and that an oral and maxillofacial surgeon may perform some aspects of these cosmetic procedures in some instances. *We hold merely that the definition of dentistry contained in Tennessee Code Annotated § 63-5-108(a)(1) does not blanketly authorize a dentist, even an oral and maxillofacial surgeon, to perform cosmetic procedures such as face lifts and nose jobs.* Consequently, we affirm the Chancery Court’s reversal of the decision of the Board of Dentistry. We do not hold that an oral and maxillofacial surgeon such as Dr. Hunter may never perform any aspect of such cosmetic procedures, nor do we address the parameters under which such procedures may be performed. We hold only that the broad authorization contained in the Board’s declaratory order is contrary to Tennessee Code Annotated § 63-5-108(a)(1). The remaining issues raised on appeal are pretermitted.

*Id.* at \*8-9 (emphasis added).

Based upon the foregoing analysis, we have determined that the Board of Veterinary Medical Examiners, by expanding the definition of the practice of veterinary medicine in the Rule adopted by the Board, *blanketly* bars persons who are not licensed veterinarians from engaging in livestock management practices, which practices were not restricted to licensed veterinarians by Tenn. Code Ann. § 63-12-113. The Board of Veterinary Medical Examiners, therefore, exceeded its statutory authority by adopting Tenn. Comp. R. & Regs. 1730-1-.02, which renders the Rule invalid.

#### DISCIPLINARY ACTION AGAINST MS. CADY

We now turn to the Board's decision to impose civil penalties against Ms. Cady upon the finding that she was practicing veterinary medicine without a license in violation of Rule 1730-1-.02.

Tenn. Code Ann. § 4-5-307 requires that reasonable notice be provided to a party before a contested case hearing is held and that such notice provide "[a] statement of the legal authority and jurisdiction under which the hearing is to be held, *including a reference to the particular sections of the statutes and rules involved.*" (Emphasis added). The Notice of Charges against Ms. Cady asserted that she was practicing veterinary medicine without a license in violation of the Tennessee Veterinary Practice Act and that she was in violation of the Administrative Rules of the Tennessee Board of Veterinary Medical Examiners, specifically Tenn. Comp. R. & Regs. 1730-1-.02, because her activities were within the Board's definition of the scope of veterinary practice.

Following the contested case hearing on the Notice of Charges, the Board found Ms. Cady's actions violated Tenn. Code Ann. § 63-12-119, Tenn. Comp. R. & Regs. 1730-1-.02, and Tenn. Comp. R. & Regs. 1730-1-.15. The Findings of Fact and Conclusions of Law stated in the Board's Disciplinary Order read as follows:

#### FINDINGS OF FACT

1. Respondent has not held a license to practice veterinary medicine in Tennessee at any time relevant to this matter.
2. Respondent is the owner of The Horse Hub, located at 280 Montgomery Road, Shelbyville, Tennessee.
3. Since 1987, Respondent has personally provided the following services for customers:
  - a. artificially inseminated mares;
  - b. flushed mares;
  - c. performed ultrasound examinations on mares to check for pregnancy;
  - d. infused horses with antibiotics;
  - e. injected Prostin and other drugs to get horses to come into season;and

f. injected HCG to get mares to ovulate.

## CONCLUSIONS OF LAW

4. The facts as found herein are sufficient to establish violation by Respondent, of the following statutes and rules that are part of the *Tennessee Veterinary Practice Act*, Tenn. Code Ann. § 63-12-101, *et seq.*, for which assessment of civil penalties and other licensure discipline are authorized:
5. T.C.A. § 63-12-119 **Penalty for unlicensed practice.** - Any person who practices or attempts to practice veterinary medicine in this state and makes a charge therefor, without having complied with the provisions of this chapter, commits a Class B misdemeanor for each instance of such practice.
6. O.C.R.R.S.T.1730-1-.02 **Scope of practice.**
  - (1) The scope of practice of veterinary medicine means to diagnose, treat, correct, change, relieve, or prevent animal disease, deformity, defect, injury, or other physical or mental conditions; including the prescription of administration of any drug, medicine, biologic, apparatus, application, anesthetic, or other therapeutic or diagnostic substance or technique, and the use of any manual or mechanical procedure for artificial insemination, for testing for pregnancy, or for correcting sterility or infertility or to render advice or recommendation with regard to any of the above.
  - (2) The scope of practice of veterinary medicine includes, but is not to be limited to, surgery, obstetrics, dentistry, chiropractic, radiology, acupuncture, animal psychology, ultrasonography, fluoroscopy, embryo transfers, homeopathy, herbology, naturopathy and all other branches or specialties of veterinary medicine.

O.C.R.R.S.T. 1730-1-.15

### (3) Civil Penalties

#### (a) Schedule of Civil Penalties

1. A Type A Civil Penalty may be imposed whenever the Board finds the person who is required to be licensed or certified by the Board is guilty of a willful and knowing violation of the Practice Act, or regulations pursuant thereto, to such an extent that there is, or is likely to be an imminent substantial threat to the health, safety and welfare of an individual client or the

public. For purposes of this section, a type A penalty shall include, but not be limited to, a person who willfully and knowingly is or was practicing as a veterinarian without a license from the Board.

The Board's determination that Ms. Cady engaged in the unlicensed practice veterinary medicine was solely based upon Rule 1730-1-.02. Our decision above invalidated Rule 1730-1-.02. Therefore, we affirm the Chancery Court's decision to reverse the Board's finding that Ms. Cady engaged in the unlicensed of veterinary medicine and to reverse the civil penalties assessed against her.<sup>12</sup>

#### **IN CONCLUSION**

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against the Board of Veterinary Medical Examiners.

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FRANK G. CLEMENT, JR., JUDGE

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<sup>12</sup> Our decision renders moot Ms. Cady's argument that the Board improperly assessed a civil penalty against her for the time period that preceded the enactment of Rule 1730-1-.02.